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No. 77-313

In the Supreme Court of the United States

OCTOBER TERM, 1977

RICHARD L. MASON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
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On September 12, 1973, the Federal Communications Commission entered a Memorandum Opinion and Order authorizing the construction and operation of an earth station as part of a domestic satellite system. *Application of Hughes Aircraft Co. (National Satellite Services Inc.)*, 43 F.C.C. 2d 1141. Petitioners are owners of land adjacent to the site of the station in the Triunfo Pass area of the Santa Monica Mountains in California. They did not participate in the Commission's proceedings or in an appeal of the Commission's order taken by other parties under Section 402(b) of the Communications Act of 1934, as amended, 66 Stat. 718, 47 U.S.C. 402(b), to the United States Court of Appeals for the District of Columbia Circuit. *Network Project* v. *Federal Communications Commission*, 511 F. 2d 786.

Section 402(c) of Title 47 provides that appeals under Section 402(b) must be filed within 30 days. On June 30, 1975, 21 months after the Commission's decision, petitioners filed a suit in the United States District Court for the Central District of California to enjoin construction of the station. Named as defendants were the Commission, the United States, GTE Satellite Corporation,[1] General Telephone and Electronics Corporation, and American Telephone and Telegraph Company. The complaint alleged that the Commission's 1973 order violated the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, because the Commission had not prepared an environmental impact statement prior to entering its order. The district court dismissed for lack of jurisdiction (Pet. App. C-1 to C-3). The court of appeals affirmed (Pet. App. A-1 to A-6).

The decision of the court of appeals is correct, does not conflict with any other decision, and does not warrant review by this court. As the court of appeals stated (Pet. App. A-2 to A-3):

> 47 U.S.C. § 402 expressly limits proceedings to "enjoin, set aside, annul or suspend" an order under Chapter 5 of the Communications Act of 1934 to the Courts of Appeals. *See also* 28 U.S.C. § 2342. Some orders may be reviewed only in the D.C. Circuit. 47 U.S.C. § 402(b). But whether or not this is such an order, § 402 clearly ousts district courts of jurisdiction over challenges to FCC orders. *Cf. United States* v. *SCRAP*, 412 U.S. 669 (1973).

[1]Successor to the original applicants.

Petitioners err in contending that Commission orders authorizing satellite facilities are entered under the Communications Satellite Act of 1962, 76 Stat. 419, 47 U.S.C. 701 *et seq.*, and are not subject to Section 402 of the 1934 Act. The court below correctly ruled (Pet. App. A-3 to A-4) that the 1962 Act was

> addressed to international, not domestic, satellite communications. 47 U.S.C. § 701. The only reference in the 1962 Act to domestic communications is the declaration of policy that Congress did not intend to preclude use of the global system for domestic communications services "where consistent with the provisions of [the 1962 Act]."
>
> We conclude that the FCC's authority over domestic satellite communications systems flows from the 1934 Act and that § 402 requires review in the Courts of Appeals, not in the district courts. This view finds support in *Network Project* v. *F.C.C.*, 511 F. 2d 786 (D.C. Cir. 1975) where the D.C. Circuit reviewed, under § 402(b), orders of the FCC authorizing construction of domestic satellite communications facilities.

Petitioners' contention that NEPA alters the jurisdictional scheme established in the 1934 Act is without merit. "NEPA was not intended to repeal by implication any other statute." *United States* v. *SCRAP*, 412 U.S. 669, 694, 696; *Flint Ridge Development Co.* v. *Scenic Rivers Assn.*, 426 U.S. 776, 788. Thus jurisdiction over challenges to FCC orders, whether founded on alleged violations of NEPA or other defects, is reserved by Section 402 exclusively to the courts of appeals, under the time limits specified in that section. See *Yakus* v. *United States*, 321 U.S. 414; *Califano* v. *Sanders*, 430 U.S. 99, 108. In the case of construction permits, which are subject

to review under Section 402(b), only the Court of Appeals for the District of Columbia Circuit has jurisdiction. *Valley Vision, Inc.* v. *Federal Communications Commission*, 399 F. 2d 511, 514 (C.A. 9).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

WERNER K. HARTENBERGER,
General Counsel,
Federal Communications Commission.

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